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No. 09-851

In The Supreme Court of the United States

BEXAR COUNTY, TEXAS, BEXAR COUNTY SHERIFF'S OFFICE AND ROBERT O'DONNELL, IN HIS INDIVIDUAL CAPACITY,
Petitioners,

v.

EARNEST LYTLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF HEATHER LYTLE, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

SONIA M. RODRIGUEZ
Counsel of Record
BRANTON & HALL, P.C.
ONE RIVERWALK PLACE, SUITE 1700
700 N. ST. MARY'S STREET
SAN ANTONIO, TX 78205
TELEPHONE: (210) 224-4474
FACSIMILE: (210) 224-1982
srodriguez@branton-hall.com

Counsel for Respondent

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I. If the Fifth Circuit deliberately conducted the two-step analysis of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed 2d 565 (2009), and simply concluded that an officer's entitlement to qualified immunity turns on genuine issues of material fact, have Petitioners established any compelling reason for this Court to grant the Petition?

II. With evidence that a fleeing vehicle poses no significant threat of harm to the officer or the public, could a rational jury conclude that the officer's shooting into the back of the car from three or four houses down the street is unreasonable?

III. On February 28, 2006, was the law clearly established that, absent any other justification for the use of force, it was unlawful for an officer to use deadly force against a fleeing suspect who does not pose any significant threat of harm to the officer or the public?

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STATEMENT OF JURISDICTION

Because Robert O'Donnell's entitlement to qualified immunity turns on genuine issues of material fact, the Court lacks jurisdiction over this interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2 411 (1985).

MATERIAL FACTS IN DISPUTE

Respondent objects to Petitioners' characterization of the facts and their reliance on any portion of the record assembled after February 14, 2008, the date of the trial court's order. Any transcript, photograph, statement or other such material filed after February 14, 2008 and included in the record on appeal was not before the trial court at the time of its ruling on question of qualified immunity. Accordingly, Petitioners' reliance on and citation to any portion of the record assembled after February 14, 2008 and numbered USAC5 269 or greater, is improper.

Robert O'Donnell's entitlement to qualified immunity turns on the genuine issues of material fact that follow: In February of 2006, Robert O'Donnell ("O'Donnell") was a deputy with the Bexar County Sheriff's Office in San Antonio, Texas.[1] Deputies were trained that: "While an officer might be justified in the discharge of his weapon, the law requires that he do so with reasonable prudence to avoid injury to others and

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[1] USCA5 95.

that he exercise care commensurate with the danger involved."[2] Deputies were also trained that:

> Shooting at or from a motor vehicle raises these issues:
>
> - Difficulty in hitting the target.
> - Ricochets striking innocent persons.
> - Population densities.
> - Difficulty in penetrating steel belted radial tires.
> - Inability to put a stop to vehicle momentum even when the target suspect is hit.
> - Liability from what may happen when suspect is disabled and control of suspects vehicle is lost.[3]

At approximately two o'clock on the afternoon of February 28, 2006, O'Donnell went on patrol.[4] An hour into his shift, O'Donnell responded to a non-emergency call from a woman who complained that her ex-boyfriend had issued threats against her, through their mutual friends.[5] The record reflects that the woman told Deputy O'Donnell that her ex-boyfriend was driving a gray Ford Taurus, and that the vehicle was probably stolen.[6] O'Donnell learned that the

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[2] USCA5 254.

[3] USCA4 254.

[4] USCA5 174.

[5] USCA5 97; 174.

[6] USCA5 174.

woman's ex-boyfriend was on bond for auto theft and for unlawfully carrying a weapon.[7] O'Donnell then spoke with a detective and learned that the same woman had previously reported that her ex-boyfriend was in a *black* Taurus.[8] O'Donnell advised the woman that if she saw her ex-boyfriend she should call 911.[9]

O'Donnell asked the dispatcher to alert other police units in the area to be on the lookout for "the suspect vehicle" as a possible stolen car.[10] O'Donnell then began driving through the woman's neighborhood, looking for the suspected stolen car.[11]

O'Donnell came upon a grey Ford Taurus parked in the driveway of a residence.[12] O'Donnell parked his police cruiser in the parking lot of an elementary school down the street and watched the Taurus, waiting for the vehicle to leave the residence, which O'Donnell characterized as "a known drug location."[13] After approximately 15 minutes, O'Donnell saw the Taurus leave the residence and he followed behind it

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[7] USCA5 174. The meager record at this point of the proceedings is silent as to the identity of this woman's ex-boyfriend.

[8] USCA5 174.

[9] USCA5 174.

[10] USCA5 174.

[11] USCA5 174.

[12] USCA5 98.

[13] USCA5 98.

in his police unit.[14] O'Donnell believed there were three (3) people in the Taurus, whom he described to his dispatcher as "three white subjects in the suspect vehicle."[15] In fact, there were four (4) people in the grey Taurus.[16] The driver of the vehicle was a 25 year-old man named Charles Judy.[17] The vehicle was also occupied by Bryan Davis, 15 year-old Heather Lytle and her teenage boyfriend, Robert.[18]

O'Donnell states that he followed the Taurus in his police cruiser.[19] When the suspect vehicle changed lanes without signaling, O'Donnell activated his emergency lights to initiate a traffic stop.[20] The Taurus did not stop.[21] Instead, the vehicle turned

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[14] USCA5 99.

[15] USCA5 175.

[16] USCA5 210.

[17] USCA5 209. Respondent disputes that Charles Judy and "the ex-boyfriend" at the heart of the complainant's call to police are one in the same. Although Petitioners infer that Judy is the "ex-boyfriend" and that he met the description provided by the woman, there is nothing in the record to suggest this. Indeed, although O'Donnell may have learned that"the ex-boyfriend" was on bond for felony theft and unlawfully carrying a weapon, there is nothing in the record to suggest that it was Mr. Judy who was on bond for those crimes, as Petitioner infers.

[18] USCA5 210 (P. 4, L. 3-5); USCA5 211 (P.7, L. 7-15).

[19] USCA5 174.

[20] USCA5 174.

[21] USCA5 174.

right onto an adjacent street and began to accelerate.[22] O'Donnell then activated his siren and continued to follow the suspect vehicle.[23] There is no evidence that O'Donnell's pursuit of the Taurus occurred at "break-neck speeds," as Petitioners have characterized. The Taurus proceeded down the residential neighborhood at speeds somewhere between 30 miles per hour[24] to "well above" 30 miles per hour.[25] The pursuit lasted only "between a quarter and a half mile."[26] This can hardly be depicted as a "Hollywood-style chase," as Petitioners have attempted to do. When the suspect vehicle attempted to turn right again, it made too wide a turn and collided with an oncoming vehicle ("the Briers vehicle") and came to a stop.[27] O'Donnell's pursuit of the Taurus ended here.

At this point, O'Donnell positioned his police cruiser directly behind the Taurus, approximately one car length away from the suspect vehicle.[28] Contrary to Petitioners' characterization, there is no evidence of

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[22] USCA5 174.

[23] USCA5 175.

[24] USCA5 102.

[25] USCA5 100.

[26] USCA5 102.

[27] USCA5 175.

[28] USCA5 107. O'Donnell explained that the distance from the front of his police unit to the back of the Taurus was "roughly 15 feet." USCA5 107 (P.16, L. 7).

a melee. O'Donnell shut off the siren[29] and he says he exited his patrol vehicle.[30] O'Donnell says he positioned himself in a "position of cover"[31] and pointed his gun in the direction of the Taurus.[32] He did not observe anyone in the Taurus exhibit any guns.[33] O'Donnell contends that as he exited his vehicle, the Taurus reversed toward O'Donnell's patrol unit.[34] This version of events is disputed by at least one witness, who says that O'Donnell was still in his patrol car when the Taurus drove away.[35]

In any event, as the Taurus reversed, it made no contact with O'Donnell and he was not injured by the vehicle.[36] Still, O'Donnell contends that as the Taurus

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[29] USCA5 110 (P. 18, L. 19).

[30] USCA5 175.

[31] USCA5 181 (P. 17, L. 18-19) ("I position myself between my driver's side door and the door jam so that if there was any possible threat, that would afford me some type of cover to where I wouldn't be injured.").

[32] USCA5 175; 182 (P. 18, L. 9).

[33] USCA5 141 (P.49, L. 5).

[34] USCA5 175; 182 (P. 18, L. 22).

[35] USCA5 244.

[36] USCA5 188. Respondent disputes that the Taurus actually struck O'Donnell's cruiser. Although Petitioners suggest that Mr. Judy himself did not dispute a second collision (Pet'rs' Br. 4 n. 3), Mr. Judy's testimony was not before the trial court. Petitioner also improperly cites to purported statements made by Mr. Judy in USCA5 462-463, and photographs at USCA5 420-428. These

reversed in his direction, he feared for his life.[37] In response to this perceived threat, O'Donnell says he discharged his weapon twice as the Taurus struck his police cruiser."[38] O'Donnell said that when he fired his weapon, he was not aiming at any individual in particular,[39] just "[a]t the vehicle that was racing back towards me."[40] One of the two shots fired by the deputy went through the rear of the Taurus and killed 15 year-old Heather Lytle, who was sitting in the back seat.[41] The driver of the Briers vehicle corroborates that O'Donnell fired "at the same time" the Taurus struck his patrol unit.[42] However, as is articulated below, other witnesses recall a materially different fact scenario.

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items are exhibits to pleadings filed at the trial court level by Respondent after the trial court's ruling on jurisdiction, *see* USCA5 258, and after Petitioners' notice of appeal. *See* USCA5 270. Respondent objects to Petitioners' reliance upon any portion of the record assembled after February 14, 2008, the date of the ruling forming the basis of this appeal. USCA5 258. The photographs, transcripts, expert opinions and other documents filed after February 14, 2008, were not available to the parties for use as evidence on the question of jurisdiction and were not before the trial court.

[37] USCA5 175; 185.

[38] USCA5 185 (P. 23, L. 4-5); 188; 192.

[39] USCA5, 141 (P.49, L. 18-19).

[40] USCA5 123 (P.31, L. 25).

[41] USCA5 124; 240; 242.

[42] USCA5 199.

O'Donnell's characterization of the shooting is called into question by at least three (3) witnesses to the incident: Marcus D. Stewart, Jasmine Brier, and Stephen Davis. In a written statement to police, Marcus D. Stewart relayed that O'Donnell shot at the vehicle only after it "started to drive away:"

> The police car pulled right up to the car's left quarter panel and I saw the officer get out of the police car, and then I saw the car that was being chased throw it in reverse to clear the other car, and that's when he rammed the police car and [it appeared that the officer was jolted when the police car got hit. The gray car got hung up on the police car briefly and then started to drive away. At the same time that the car started to drive away the officer shot twice at the car. Then the officer got back into his police car and started chasing the car again.[43]

Jasmine Briers, the passenger in the Briers vehicle stated that O'Donnell fired at the Taurus *as it was driving away* from the scene of the collision:

> My dad stopped with the brakes hard and a guy hit us. Behind the guy there were cops and he tried to back up and he hit the cops and then he put the [sic] so it could go forward and the cop got out and shot twice at the guy. He shot twice at the guy as the guy was driving away. The

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[43] USCA5 192.

> cop got back in the car and chased back after him.[44]

According to Stephen Davis, a passenger in the Taurus, O'Donnell fired upon the Taurus well *after* it sped away from the site of the automobile collision:

> And the officer slid in behind us, I'm not sure if Charlie backed into the officer or the car had already hit, the officer's car had already hit us and then Charlie took off and we got out you know **a little way up the street** and I heard tax, tax, tax, tax, about four times and I noticed the foam in the, in the, in the back seat was like you know what I mean? And I was like I looked over at her and I said are you okay, I said are you shot or anything and she leaned forward and I seen a bullet hole in the back of her.[45]

In his exchange with a police interrogator,[46] Davis indicated that O'Donnell fired upon the Taurus from "three or four houses" away, as the Taurus drove away from the officer:

> MALE: Was the, was the officer out of the car or in the car?
>
> DAVIS: He was in the car.

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[44] USCA5 206.

[45] USCA5 242 (Emphasis added).

[46] The police interrogator is designated as "male" in the tape transcription of the interrogation.

MALE: Okay.

DAVIS: As far as I know he was in the car (inaudible) I, I turned around and looked and I, I seen him getting out of the car as we were going away.

MALE: Did you, did you see him out of the car at any point?

DAVIS: I didn't see him (inaudible). I just seen his car door open, that was it, and then you know we were like maybe three, maybe four houses up . . .

MALE: Three or four houses up before you (inaudible) before . . .

DAVIS: I heard (inaudible) a gunshot, yeah.[47]

. . .

MALE: Okay, and you sure that you were three or four, four houses away from (inaudible)?

DAVIS: (Inaudible) we were a ways away, yes, sir.

MALE: (Inaudible) well, let me, let me try to (inaudible) it's kind of important, are

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[47] USCA5 244.

> you sure that you were three or four houses . . .
>
> DAVIS: Yeah, yeah we were already, we were already driving away from the, we were already driving away from the accident.[48]

While Petitioners caution that Mr. Davis's testimony lacks credibility,[49] Respondent urges that any inconsistencies in Mr. Davis's testimony must be resolved by the fact finder.

The parties dispute more than just the distance and direction that the Taurus traveled when O'Donnell discharged his weapon. The parties also disagree about whether the Taurus posed a threat to the public after it fled the collision. As the Fifth Circuit correctly concluded, this issue is material to whether O'Donnell's act of shooting at the automobile from several houses away was reasonable. By all accounts,

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[48] USCA5 245.

[49] In their recitation of facts, Petitioners cite to statements made by Mr. Davis in USCA5 444 and USCA5 445. These pages are exhibits to pleadings filed at the trial court level by Respondent after the trial court's ruling on jurisdiction, *see* USCA5 258, and after Petitioners' notice of appeal. *See* USCA5 270. Respondent objects to Petitioners' reliance upon any portion of the record assembled after February 14, 2008, the date of the ruling forming the basis of this appeal. USCA5 258. The photographs, transcripts, expert opinions and other documents filed after February 14, 2008, were not available to the parties for use as evidence on the question of jurisdiction and were not before the trial court.

the Taurus fled the scene of the automobile collision.[50] Contrary to Petitioners' characterization of events, there were no bystanders in the path of the vehicle and neither the Taurus nor any of its occupants posed a threat of harm to O'Donnell or others.

Out of sequence and context, Petitioners reference statements that suggest the presence of children at the scene (Pet'rs' Br. 7, 9). These stray quotations mischaracterize the facts of this case. There is nothing in the record to suggest there were children at the scene or in the path of the Taurus as fled the collision. There is no evidence that children were in the street after the Taurus drove away. What is apparent from the record is that at some point *prior to* the collision, the Taurus drove past children playing basketball in the street.[51] And at some point much later, after police arrived to investigate the scene of the shooting, children were present in the street and at least one child pointed out a shell casing on the ground.[52]

Petitioners imply that O'Donnell discharged his weapon to protect the public in the path of the fleeing vehicle. This position flies in the face of the facts. O'Donnell was asked multiple times what caused him to fire his weapon[53] and specifically, what was going

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[50] USCA5 189.

[51] USCA5 194.

[52] USCA5 200.

[53] USCA5 190 (P.54, L. 2) ("And what caused you to fire your weapon?"); USCA5 184 (P.20, L. 5-8) ("Deputy, as you were standing behind your open car door, and you saw the vehicle

through his mind when he fired.[54] He never suggested that he fired his gun in an effort to protect innocent citizens from an imminent danger, as Petitioners now suggest. Donnell did *not* shoot at the Taurus to prevent it from speeding through a neighborhood of children, as Petitioners would have this Court infer. Instead, O'Donnell testified unequivocally that "I fired my weapon because I was in fear for my life."[55] When asked what was going through his mind as he fired, O'Donnell testified that: "I was in fear for my life. I feared that the defendant was going to run me over and kill me."[56] Most significant, however, is O'Donnell's testimony that once the Taurus *sped away* from the scene of the collision, O'Donnell no longer considered the Taurus a deadly weapon.[57] In response to questioning about the exact point in time that O'Donnell considered the vehicle a threat, O'Donnell testified as follows:

> Q: All right. At that point, he was fleeing away from you, and at that point he was not using that vehicle as a deadly weapon against you, was he?

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driven by the defendant backing up . . . what was going through your mind?").

[54] USCA5 184.

[55] USCA5 190 (P. 54, L. 6); see also USCA5 190 (P. 54, L. 11-13)("The fact that it was accelerating rapidly back directly at myself and my vehicle placed myself in fear for my life, and I fired my weapon.").

[56] USCA5 184.

[57] USCA5 189 (P.42, L. 3, 8).

A: No.

Q: Okay. At the point at which he accelerated at a high rate of speed away from you he was not using that vehicle as a deadly weapon against you, was he?

A: No.

Q: After the initial collision and he backed into your patrol vehicle and the shots were fired and he flees away from you, he was no longer - - in your opinion, using the vehicle as a deadly weapon against you at that point, was he?

A: Not after he initially came back at me.

Q: Okay. It's your opinion that he was using it as a deadly weapon when he struck your vehicle. Is that right?

A: When he came directly back at me at a high rate of speed, yes, sir.[58]

O'Donnell specified that his decision to shoot at the Taurus was based specifically on the threat to his own life: the vehicle "coming directly back" at him.[59] Nothing in the record suggests that O'Donnell perceived any threat to others by the vehicle's flight. After discharging his weapon, O'Donnell returned to

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[58] USCA5 133-134.

[59] USCA5 142 (P.50, L. 5-7).

his patrol unit and pursued the Taurus through the neighborhood and the chase ended only when the Taurus lost control and crashed in an alley.[60]

Based on these facts, Ernest Lytle ("Lytle") sued O'Donnell and the Bexar County Sheriff's Office for the wrongful death of his teenage daughter.[61] Lytle alleges that O'Donnell and the Bexar County Sheriff's Office violated Heather's Fourth Amendment right to be free from unreasonable seizure when she was shot in the back and killed by O'Donnell. Lytle urged that Heather was killed as a result of force that was clearly excessive to the need for force, the excessiveness of which was objectively unreasonable.[62] Lytle contends that neither Heather, nor any of the persons in her company posed any immediate danger or threat to O'Donnell or to the public when she was shot and killed.[63]

District Court Proceedings

Petitioners mischaracterize the district court proceedings. The district court did not conclude that the grant or denial of qualified immunity hinged *solely* on the "direction and distance the suspect vehicle had traveled when Deputy O'Donnell discharged his weapon." Although the district court noted the dispute regarding the direction and distance of the suspect

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[60] USCA5 175.

[61] USCA5 59.

[62] USCA5 59.

[63] USCA5 59.

vehicle in denying summary judgment, the remainder of the trial court's order reveals that resolution of this disputed fact is essential to determining whether the Taurus posed a threat of harm at the time O'Donnell fired and the reasonableness of his response thereto. *See Lytle v. Bexar County*, 543 F. Supp. 2d 656, 659 (W.D. Tex. 2008).

Decision of the Fifth Circuit

Petitioners also mischaracterize the decision of the Fifth Circuit. The Fifth Circuit faithfully followed the two-step analysis of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed 2d 565 (2009). The Fifth Circuit did not "disregard any future threat the Taurus may have posed once it was 'three or four houses away' from Deputy O'Donnell," as Petitioners suggest (Pet'rs' Br. 11). Instead, the Court specifically considered whether the fleeing vehicle posed any threat to the lives and well-being of others (motorists, pedestrians, police officers. *See Lytle v. Bexar County*, 560 F.3d 404, 415 (5th Cir. 2009). It concluded that genuine issues of material fact exist on this point. Further, the Fifth Circuit did not focus its analysis *solely* on the state of events "at the very moment Deputy O'Donnell fired his weapon," as Petitioners contend (Pet'rs' Br. 11). The Court sorted through the "meager record" and simply concluded that in light of the factual disputes regarding a number of material points, a jury could determine that O'Donnell acted unreasonably in firing at the back of the Taurus and thus violated Heather Lytle's constitutional rights.

REASONS FOR DENYING THE PETITION

A. Petitioners have failed to establish any compelling reason for this Court to grant the Petition.

The Fifth Circuit deliberately conducted the two-step analysis of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct. 808, 172 L.Ed 2d 565 (2009), and simply concluded that O'Donnell's entitlement to qualified immunity turns on genuine issues of material fact. The Fifth Circuit's opinion below is entirely consistent with this Court's analysis in *Saucier*, and its progeny, including *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 1775, 167 L. Ed. 2d 686 (2007). The Fifth Circuit did not ignore *Scott* or create a split in the circuits as Petitioners suggest. The Court simply concluded that the facts in this interlocutory appeal merely indicate that O'Donnell's conduct is not beyond question. *Lytle*, 560 F.3d at 417. The Fifth Circuit's holding is narrow: a jury considering all the relevant circumstances in this case could conclude that O'Donnell acted unreasonably. *Id.* Petitioners have failed to articulate any compelling reason that their Petition should be granted. Therefore, Respondent respectfully requests that the Petition is denied.

Petitioners suggest that the Fifth Circuit's opinion conflicts with this Court's opinion in *Scott*. This argument ignores the unique nature of the evidence before this Court in *Scott* (Pet'rs' Br. 14). In *Scott*, there was little room to debate the actions of the fleeing vehicle. *Scott*, 550 U.S. at 379, 127 S. Ct. at 1775, 167 L. Ed. 2d at 693. A videotape captured the

events in question. *Id.* There was no contention that the videotape was doctored or altered in any way, nor any argument the depiction captured on the videotape differed from what actually happened. *Id.* The videotape provided indisputable proof of a terrorizing, high-speed chase:

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379-380, 127 S. Ct. at 1775, 167 L. Ed. 2d at 693. In light of these facts, this Court concluded that the uncontroverted videotape made it "quite clear" that the deputy did not violate the Fourth Amendment. *Id.* at 381, 127 S. Ct. at 1776, 167 L. Ed. 2d at 694. The facts are not so clear in the present case. Here, the parties' versions of events differ: First, about nature of the pursuit that preceded O'Donnell's use of force; second, about the distance and direction the Taurus traveled when O'Donnell fired; and third, about whether the

vehicle posed any significant threat after it fled the officer.

When parties' versions of events differ, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. *Id.* at 378, 127 S. Ct. at 1774, 167 L. Ed. 2d at 692 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 1776 (1962) *(per curiam)*). The Fifth Circuit did so appropriately in this case.

Further, the Fifth Circuit sorted carefully through the factbound morass of "reasonableness," as this Court dictated in *Scott*: "[I]n determining the reasonableness of the manner in which a seizure is effected, '[courts] must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* at 383, 127 S. Ct. at 1778, 167 L. Ed. 2d at 696 (quoting *United State v. Place*, 462 U.S. 696, 703, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983)). The Fifth Circuit conducted this balancing test in the present case and appropriately "delve[d] into the facts and circumstances" of the case. *See Lytle*, 560 F.3d at 411. The Court picked through "all of the relevant facts and circumstances relevant to the reasonableness of O'Donnell's conduct, including not just the threat of harm caused by the fleeing vehicle, but also O'Donnell's conduct in response to the threat. *Id.* It concluded simply that:

> It is unclear how firing at the back of a fleeing vehicle some distance away was a reasonable method of addressing the threat. Indeed, there

> is some evidence in the record that O'Donnell had been previously informed of the potential danger and futility of shooting at a vehicle. Were a jury to accept Lytle's version of the facts, it might very well be troubled by O'Donnell's act of firing his sidearm at the back of a vehicle three or four houses down the block of a residential area when he was unlikely to have a shot a – and apparently was not aiming for – the driver.

Id. at 412. After a thorough review of other similar cases throughout the country, *Id.* at 415 - 417, and considering the "totality of the circumstances," the Fifth Circuit concluded that a reasonable jury might conclude that O'Donnell's conduct could be viewed as unreasonable:

> A rational jury could conclude that the [fleeing vehicle] did not pose an especially significant threat of harm such that the use of deadly force was justified. Further, when weighing the threat of harm posed by the [fleeing car] against O'Donnell's chosen course of conduct – firing at the back fo the vehicle from some distance – the jury could conclude that O'Donnell's conduct was not a reasonable response to any threat.

Id. at 417. The Court conducted the exact balancing test offered by the Supreme Court in *Scott*. Indeed, the Fifth Circuit carefully considered the Supreme Court's analysis in *Scott* and its opinion is consistent with the decision in *Scott*. Because Petitioners have failed to articulate any compelling reason to grant the Petition, Respondent respectfully requests that the Petition is denied.

B. It was unreasonable for O'Donnell to believe he could stop a fleeing vehicle by shooting at it from three or four houses down the street; and shooting at the car was not a reasonable response to the threat posed by the fleeing vehicle.

In determining the reasonableness of the manner in which a seizure is effected, the court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *See Scott*, 550 U.S. at 383, 127 S. Ct. at 1778, 167 L. Ed. 2d 696, (quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 77 L.Ed. 2d 110 (1983). Petitioners argue that O'Donnell's use of force was a reasonable response to the threat of harm that the Taurus posed to the officer and the public. They further contend that this threat was ever-present, and thus suggest any dispute over the distance or direction that the Taurus had traveled was necessarily immaterial. In other words, according to Petitioners, the threat that the Taurus posed was sufficiently grave whether the Taurus was reversing toward the deputy or it was four houses down the block, driving away. Therefore, Petitioners argue, even if the disputed factual issues are resolved in favor of the plaintiff, O'Donnell would still be entitled to qualified immunity, rendering any factual disputes immaterial.

As the Fifth Circuit correctly concluded, Petitioners misunderstand the issue to be merely one of distance and direction. Although the district court noted this dispute in denying summary judgment, the remainder of its order reveals that resolution of this disputed fact

is essential to determining whether the Taurus posed a threat of harm at the time O'Donnell fired and the reasonableness of any response thereto. *Lytle*, 560 F.3d at 412.

If the facts were as Petitioners allege – that is, O'Donnell fired as or immediately after the Taurus was backing up toward him – would likely be entitled to qualified immunity. *Id.* This is due to the threat of immediate and severe physical harm that the reversing Taurus likely posed to O'Donnell himself. However, as the Fifth Circuit noted, the threat of harm was potentially much different under Respondent's version of the facts. *Id.* Petitioners are thus mistaken in asserting that the distance and direction the Taurus traveled are irrelevant *because* the Taurus always posed a threat. *Id.* They are instead relevant to *whether* the Taurus posed a threat. *Id.*

Further, because the trial court must look at all of the facts and circumstances relevant to the reasonableness of O'Donnell's conduct, Petitioners are mistaken to focus entirely on the threat of harm. *Id.* at 413. Even if Petitioners characterization of the threat posed by the Taurus were accurate, the court would be remiss not to consider O'Donnell's conduct in response to that threat. *Id.* As the Fifth Circuit noted:

> It is unclear how firing at the back of a fleeing vehicle some distance away was a reasonable method of addressing the threat. Indeed, there is some evidence in the record that O'Donnell had been previously informed of the potential danger and futility of shooting at a vehicle. Were a jury to accept Lytle's version of the facts, it might very well be troubled by O'Donnell's act

> of firing his sidearm at the back of a vehicle three or four houses down the block of a residential area when he was unlikely to have a shot at--and apparently was not aiming for--the driver. A jury might also find that O'Donnell's act of firing at a vehicle driving away from him in a residential area posed a risk that the shots might strike an unintended target. *Id.*

Thus, even this Court were to assumed that the Taurus posed a significant threat of harm, a jury could conclude that O'Donnell's conduct in response to that threat was unreasonable. *Id.* In other words, in light of the facts cited above, O'Donnell's conduct itself weighs against a conclusion of reasonableness.

Moreover, by the time the Taurus was three or four houses away, a jury could conclude that any immediate threat to O'Donnell had ceased. *Id.* Certainly, the Taurus might have posed an immediate and significant threat of harm to O'Donnell when it was backing up toward him. But an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased. *See Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."); *see also Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."). Accordingly, even if one were to assume

that shooting at the Taurus was reasonable at the moment it was backing up toward O'Donnell, that does not necessarily make his firing at the vehicle when it was driving away from him equally reasonable. *Id.*

A suspect that is fleeing in a motor vehicle is not so inherently dangerous that an officer's use of deadly force is *per se* reasonable. In assessing the reasonableness of a police officer's use of force, courts must instead delve into the facts and circumstances of each case, as the Fifth Circuit did. Taking the facts of the present case in the light most favorable to Respondent, a jury could conclude that the Taurus posed some threat of harm. But the Taurus was not so menacing that any use of force in an attempt to stop it would be objectively reasonable as a matter of law. A jury accepting Respondent's version of the facts could conclude that the Taurus did not pose a sufficient threat of harm such that the use of deadly force was reasonable. O'Donnell had pursued the Taurus for only a quarter-to-half mile before the shooting occurred,[64] raising a question of whether O'Donnell had sufficient indicia to conclude that the Taurus posed such a threat of harm. Also, there were no children or bystanders in the path of the vehicle, indicating that no one was in immediate danger. As the Taurus fled, there were no officers chasing the vehicle, because O'Donnell had not called for back up at that point. Therefore, no officers were at risk of immediate harm as the vehicle fled.

Because a reasonable jury could conclude that O'Donnell's act of shooting at the fleeing vehicle from four houses away was futile and an unreasonable

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[64] USCA5 102.

response to the threat posed by the vehicle, the trial court properly denied summary judgment. For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari is denied.

C. On February 28, 2006, it should have been clear to O'Donnell that it was unlawful to shoot into the back of a fleeing vehicle from three or four houses away, when the vehicle poses no significant threat of harm to the deputy or the public.

At the second step of the qualified immunity inquiry, it is appropriate to ask whether the violated constitutional right was clearly established at the time of the violation. *See Hope v. Pelzer*, 536 U.S. 730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). When conducting this analysis, the central concept is that of "fair warning." *Id.* The law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.*

Respondent urges that in February of 2006, it would have been clear to any reasonable police officer that shooting at a fleeing vehicle, when the automobile posed no threat of harm to other officers, pedestrians or other motorists in its path, was unlawful. At the time of the shooting, it was clearly established under *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 1701, 85 L. Ed. 2d 1, 11 (1985), that police officers may not fire at non-dangerous fleeing motorists. *See Hathaway v. Bazany*, 507 F.3d 312, 322 (5th Cir. 2007). In *Garner*, the Supreme Court held that the "use of

deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* "Where the suspect poses no immediate threat to the officer and no threat to others," it observed, "the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.*

Although *Garner* did not involve a fleeing motorist, its holding was clear enough to have placed O'Donnell on notice that his conduct was unconstitutional. *See e.g., Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004). On February 28, 2006, the law was quite clear that deadly force would only be justified by a reasonable belief that the officer or the public was in imminent danger. *Id.* For the first time on appeal, Petitioners concede that O'Donnell fired at the vehicle as it fled. In O'Donnell's defense, Petitioners suggest that O'Donnell fired his weapon as the vehicle fled to protect other officers, pedestrians and motorists. This position flies in the face of the facts. O'Donnell was asked multiple times what caused him to fire his weapon[65] and specifically, what was going through his mind when he fired.[66] It is significant to note that O'Donnell never suggested that he fired his gun in an effort to protect innocent citizens from an "imminent danger," as Petitioners now suggests. O'Donnell did *not* shoot at the Taurus to prevent it from speeding

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[65] USCA5 190 (P.54, L. 2) ("And what caused you to fire your weapon?"); USCA5 184 (P.20, L. 5-8) ("Deputy, as you were standing behind your open car door, and you saw the vehicle driven by the defendant backing up . . . what was going through your mind?").

[66] USCA5 184.

through a neighborhood of children, as O'Donnell would have this Court infer.[67] Instead, O'Donnell testified that "I fired my weapon because I was in fear for my life."[68] When asked what was going through his mind as he fired, O'Donnell testified that: "I was in fear for my life. I feared that the defendant was going to run me over and kill me."[69] Most significant, however, is O'Donnell's testimony that once the Taurus *sped away* from the scene of the collision, O'Donnell no longer considered the Taurus a deadly weapon.[70] Nothing in the record suggests that O'Donnell perceived any threat to others by the vehicle's flight. At the point the Taurus was four houses away and fleeing from O'Donnell, it would have been clear to a reasonable police officer that using deadly force to attempt to stop the vehicle was futile and it was unconstitutional.

Opinions in other jurisdictions substantiate that in February of 2006, it was "clearly established" that shooting at a fleeing vehicle that posed no significant

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[67] To the extent that Petitioners suggest that there were children in the vicinity of the Taurus' escape route, there is no such evidence in the record. Reference is made to children playing in the street before the automobile collision, and before O'Donnell discharged his weapon. But, there is nothing to suggest the public was in immediate danger of the Taurus' flight.

[68] USCA5 190 (P. 54, L. 6); *see also* USCA5 190 (P. 54, L. 11-13)("The fact that it was accelerating rapidly back directly at myself and my vehicle placed myself in fear for my life, and I fired my weapon.").

[69] USCA5 184.

[70] USCA5 189 (P.42, L. 3, 8); 133-34.

threat to officers, pedestrians or other motorists was unlawful. A number of cases predate the conduct in question and gave fair notice to O'Donnell. *See e.g., Cowan ex rel. Estate of Cooper v. Breen,* 352 F.3d 756, 763 (2d Cir. 2003); *Abraham*, 183 F.3d at 288-296; *Waterman,* 393 F.3d at 474; *Ellis*, 999 F.2d at 247; *Estate of Starks v. Enyart* 5 F.3d 230, 234 (7th Cir. 1993); *McCaslin v. Wilkins,* 183 F.3d 775, 778-779 (8th Cir. 1999); *Vaughan v. Cox*, 343 F.3d 1323, 1327 (11th Cir. 2003).

As the Fifth Circuit accurately concluded, "it has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." *Lytle,* 560 F.3d at 417. This holds as both a general matter, *see Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701, 85 L. Ed. 2d at 11, and in the more specific context of shooting a suspect fleeing in a motor vehicle, *see, e.g., Vaughan*, 343 F.3d at 1332-33. The right in question was therefore clearly established on February 28, 2006, and this is sufficient to affirmatively answer the qualified immunity question.

CONCLUSION

Petitioners have failed to establish any compelling reason for this Court to grant the Petition. Were a jury to accept the eyewitness' characterization of the shooting, it could conclude that O'Donnell had violated Heather Lytle's clearly established constitutional right to be free from an unreasonable seizure. Because Respondent's version of disputed facts permits a decision adverse to O'Donnell, the district court was correct to conclude that O'Donnell's entitlement to

qualified immunity turns on the resolution of these factual issues. These disputed factual issues are thus material as to whether O'Donnell is entitled to qualified immunity, and this Court consequently lacks jurisdiction over this interlocutory appeal. Therefore, Respondent respectfully requests that the Petition is denied.

Respectfully Submitted,

Sonia M. Rodriguez
Counsel of Record
Branton & Hall, P.C.
One Riverwalk Place, Suite 1700
700 N. St. Mary's Street
San Antonio, TX 78205
Telephone: (210) 224-4474
Facsimile: (210) 224-1982
srodriguez@branton-hall.com

Counsel for Respondent